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November 14, 2008

Chief Justice Ronald M. George
and the Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

**Letter Brief of Amicus Curiae Urging Denial of Petition for Writ and
Denial of Stay in**

Tyler, et al. v. Horton, et al., Case No. S168066

Honorable Justices:

Pacific Justice Institute, on its own behalf, submits this *amicus* letter brief to address the legal standards for granting the Petition for Writ of Mandate to prevent the implementation of Article II, §8 of the California Constitution.

Summary of the Argument

The Petitions request for an immediate stay should be denied because the California Supreme Court lacks the authority to stay implementation of a duly enacted amendment to the Constitution.

In addition, the Petition itself should be denied for the following three reasons:

Chief Justice Ronald M. George
and the Associate Justices of the
California Supreme Court
November 12, 2008
Page 1 of 5

1

1. The Petitioners' argument that court decisions can never be addressed by ballot initiatives is plainly erroneous.
2. The Petitioners, having been married prior to the passage of Proposition 8, have not demonstrated that they are beneficially interested in the status of the marriage amendment.
3. The Petitioners have failed to plead a "public interest" exception for standing.

Interest of Amicus Curiae

Pacific Justice Institute is a nonprofit organization which has provided extensive legal counsel and representation to religious organizations and people of faith relative to amending the California Constitution so that marriage is defined with clear parameters. In addition, Pacific Justice Institute attorneys represent scores of churches in securing their expressive rights of religion, speech, and association under the U.S. and California Constitutions, as well as protecting them from interference by the government, in violation of the Establishment Clause, in theological and ecclesiastical matters.

Argument

I. The California Supreme Court lacks the authority to stay implementation of a duly enacted amendment to the Constitution.

The Petitioners do not provide a scintilla of legal support for their request for an "immediate stay." Instead, the request consists entirely of entries as follows: (1) the cover page, (2) the prayer, and (3) the conclusion. Needless to state, the Petitioners have not satisfied their burden to argue the merits of the remedy sought. Failure to raise or adequately argue an issue in the opening brief waives the point for review by appellate courts. *Livingston v. Marie Callender's, Inc.* (1999) 72 Cal.App.4th 830, 834.

Out of an abundance of caution, *amicus* will briefly address the issue. Section 923 of the California Code of Civil Procedure does not, on its face, provide authority for the Supreme Court to stay the implementation of

Article II, §8 of the California Constitution while it is under review by the Court.

Moreover, a writ of *supersedeas* does not offer an avenue for staying a provision enacted by the voters. “[A] writ of *supersedeas* will not issue ‘where no process of or action by the court below is involved.’” *Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal. App. 2d 368, 377 (string cite omitted). In the present petition before this Court, there are no lower court orders for which this procedure can be employed.

Indeed, *amicus* has reviewed the case law and have found no case, published or unpublished, in California’s 158 years of judicial history in which this Court has stayed implementation of a duly enacted provision of the Constitution under any legal theory. Such action would be an usurpation by the judiciary in violation of the separation of powers. CA Const. Art. III, §3.

II. The Petitioners’ argument that court decisions can never be addressed by ballot initiatives is plainly erroneous.

The Petitioners argue that the voters are precluded from directly addressing court decisions that the people have deemed inappropriate. Petition at pp. 9-10. A similar position was considered and rejected by this Court in a constitutional dispute involving the death penalty. *People v. Frierson* (1979) 25 Cal. 3d 142. “[T]he adoption of defendant’s position might effectively bar the people from ever directly reinstating the death penalty, despite the apparent belief of a very substantial majority of our citizens in the necessity and appropriateness of the ultimate punishment.” *Id.*, 187. The adoption of the initiative relative to the death penalty in *Frierson* was a direct result of the people’s response to a specific decision by this Court in *People v. Anderson* (1972) 6 Cal. 3d 628, 656. *Frierson* at, 184-185.

In view of this Court’s opinion in *Frierson*, the Petitioners’ premise is fundamentally flawed.

III. The Petitioners, having been married prior to the passage of the Constitutional Amendment, have not demonstrated that they are beneficially interested in the marriage amendment.

A court has the authority “to compel the performance of an act which the law specially enjoins, as a duty resulting from an office.” Code of Civil Procedure § 1085. In the present matter, the Petitioners claim a personal beneficial interest in the issuance of the writ based upon their same-sex marriage sometime between June 16 and November 5, 2008. Petition at pg. 1, ¶ 1. In that the Petitioners have not demonstrated any harm to themselves which would support standing to seek invalidation of the constitutional amendment in question, they lack standing to proceed.

“One who invokes the judicial process does not have ‘standing’ if he, or those whom he properly represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented. ...” *Bilafer v. Bilafer*, (2008) 161 Cal. App. 4th 363, 370. Because these Petitioners have alleged no facts showing that there is a duty by a state officer, and that Petitioners are beneficially interested in the performance of that duty, the Petition fails to meet standing requirements for the issuance of a writ.

IV. The Petitioners have failed to plead a “public interest” exception for standing.

A party who is not beneficially interested may still have standing in a writ proceeding based upon the “public interest” exception. *Green v. Obledo* (1981) 29 Cal.3d 126; *Bd of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98. However, the Petitioners did not plead a public interest exception, but, as discussed above, alleged a personal beneficial interest. Because of this pleading defect, the Petition should be denied.

Conclusion

The Petitioners fail to present a cogent argument for an immediate stay of Art. II, §8 of the Constitution. Moreover, because this Court lacks authority for said remedy, the request for a stay should be denied as without merit. In addition, *amicus* requests that the Petition be denied for the reasons stated above.

Respectfully submitted,

PACIFIC JUSTICE INSTITUTE

A handwritten signature in black ink, appearing to read "Kevin T. Snider".

Kevin T. Snider, SBN # 170988
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PROOF OF SERVICE

I declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of Sacramento. My business address is 9851 Horn Road, Ste. 115, Sacramento, CA 95827. On November 12, 2008, I caused to be served the following document.

AMICUS CURIAE LETTER IN OPPOSITION TO THE PETITION FOR WRIT OF MANDATE FILED BY ROBIN TYLER (ROBIN TYLER, ET AL. v. STATE OF CALIFORNIA, ET AL.)

By placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown, in the following manner:

SEE ATTACHED SERVICE LIST

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I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on November 12, 2008, at Sacramento, California.



Ryan Losey